BRIEF

In Support of Petition for a Writ of Certiorari.

I.

OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit was filed March 1, 1943, and is reported in 134 Fed. (2d) 240. The decree of the United States Circuit Court of Appeals was entered in conformity with said opinion on April 14, 1943, and is not officially reported.

The findings of fact, conclusions of law and order of the National Labor Relations Board are reported in 44 N. L. R. B. 1.

II.

JURISDICTION.

A statement of the grounds on which the jurisdiction of this Court is invoked is given in the petition (p. 2), and, to avoid duplication, is not repeated.

III.

STATEMENT OF THE CASE.

A statement of the case has been given in the petition (pp. 5 to 9), and, to avoid duplication, is not repeated.

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

1. The Circuit Court of Appeals erred in holding that the National Labor Relations Act precludes the right of individual contract between an employer and an employee,

either prior to or after the selection of representatives for the purpose of collective bargaining, when the contracts (a) contain no provisions repugnant to the National Labor Relations Act, and (b) are not obtained by means of any unfair labor practice.

2. The Circuit Court of Appeals erred in enjoining the Company from giving effect to individual contracts of employment (without prejudice to the assertion by the employees of any legal rights they may have acquired under such contracts), when such contracts (a) contain no provisions repugnant to the National Labor Relations Act, and (b) have not been obtained by means of any unfair labor practice, and in enjoining the Company in perpetuity from requesting its employees to enter into any similar contracts of employment.

3. The Circuit Court of Appeals erred in affirming the ruling of the Trial Examiner refusing to admit the testimony of individual members of the Independent.

4. The Circuit Court of Appeals erred in upholding the finding of the Board that the Company had instigated the formation of the Independent, and dominated and interfered with its administration.

5. The Circuit Court of Appeals erred in upholding the finding of the Board that William Elliott had been discriminatorily discharged.

6. The Circuit Court of Appeals erred in refusing to set aside the order of the National Labor Relations Board and in granting the request for its enforcement.

V.

ARGUMENT.

A.

An examination of the individual contracts (a copy of which is set forth as an appendix hereto, pp. 31-35), will show that they contain no provisions repugnant to the National Labor Relations Act. The Circuit Court of Appeals, although strongly urged by both the Board and the American Federation of Labor, refused to make any such finding. These individual contracts are not "yellow dog" contracts. No employee, by signing such contract, waives or restricts any of the rights guaranteed to him by the Act. In this respect the contracts are fundamentally different than the contracts involved in the case of National Licorice Co. v. National Labor Relations Board, 309 U. S. 350, where the contracts committed each employee not "to demand a closed shop or a signed agreement by his employer with any union," and contained other illegal restraints upon the employees' rights. They also differ in this respect from the contracts involved in every other reported case, with one exception, wherein the Courts have invalidated individual contracts as being in conflict with the National Labor Relations Act. The one exception is the case of **National Labor Relations Board v. J. I. Case Co., 134 Fed. (2d) 70,** where the contracts contained no illegal provisions, and had not been obtained by means of any illegal acts, but had been urged by the company as the justification for a refusal to bargain collectively with a duly certified collective bargaining agency.

Nor were the individual contracts the fruits of any unfair labor practice. Neither the Board nor the Circuit Court of Appeals so found. While the Court found that the employees "were urged to execute such contracts, although they were also informed that it was optional with

them to do so'' (Supp. p. 19), such acts did not constitute an unfair labor practice, and constituted no violation of the Act. This is particularly true since the signing of the contracts was not made a condition of employment (Supp. pp. 274-275, 500, 501).

The individual contracts containing no illegal provisions, and having been obtained by no illegal means, they come within the protection of the Fifth Amendment to the Constitution of the United States, and within the class of contracts referred to by the Supreme Court in the cases of **Virginian Railway Co. v. Federation, 300 U. S. 515,** and **National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1.**

The Railway Labor Act contains provisions similar to and at least as broad as those of the National Labor Relations Act, granting to employees of carriers the right to form, join and assist labor organizations and to bargain collectively through representatives of their own choosing, and prohibiting employer interference with the exercise of such rights. In the case of **Virginian Railway Co. v. Federation,** supra, the employer contended that the decree of the Court below undertook to forbid it to enter into contracts of employment with its individual employees, and was in that respect not warranted by the statute, and was in violation of the due process clause of the Fifth Amendment. This Court held that the employer misconstrued the decree, saying (l. c. 548):

> "We think, as the Government concedes in its brief, that the injunction against petitioner's entering into any contract concerning rules, rates of pay and working conditions, except with respondent, is designed only to prevent collective bargaining with anyone purporting to represent employees, other than respondent, who has been ascertained to be their true representative. When read in its context it must be taken to prohibit the negotiation of labor contracts, generally applicable to employees in the mechanical

department, with any representative other than respondent, **but not as precluding such individual contracts as petitioner may elect to make directly with individual employees."**

The Government brief, as quoted (l. c. 549), makes the statement that

> "Neither the statute nor the decree prevents the carrier from refusing to make a collective contract and hiring individuals on whatever terms the carrier may by unilateral action determine. In hirings of that sort the individual does not deal in a representative capacity with the carrier and the hiring does not set general rates of pay, rules, or working conditions."

Later the Court said (l. c. 557):

> "The provisions of the Railway Labor Act applied in this case, as construed by the court below, and as we construe them, do not require petitioner to enter into any agreement with its employees, **and they do not prohibit its entering any such contract of employment as it chooses, with its individual employees."**

L. c. 559:

> "The provisions of the Railway Labor Act invoked here neither compel the employer to enter into any agreement, **nor preclude it from entering into any contract with individual employees."**

In the case of **National Labor Relations Board v. Jones & Laughlin Steel Corp.**, supra, the contention was made that the National Labor Relations Act, and particularly the provisions of Section 9 (a), providing that representatives for the purpose of collective bargaining of a majority of the employees in an appropriate unit shall be the exclusive representatives of all the employees in such unit, violated the due process clause of the Fifth Amendment. This Court pointed out (l. c. 44) that said Section 9 (a)

merely "imposes upon the respondent only the duty of conferring and negotiating with the authorized representatives of its employees for the purpose of settling a labor dispute." The Court then compared this provision with the corresponding provision of the Railway Labor Act, saying (l. c. 44):

> "This provision has its analogue in § 2, Ninth, of the Railway Labor Act, which was under consideration in Virginian Railway Co. v. System Federation, No. 40, supra. The decree which we affirmed in that case required the Railway Company to treat with the representative chosen by the employees and also to refrain from entering into collective labor agreements with anyone other than their true representative as ascertained in accordance with the provisions of the Act. We said that the obligation to treat with the true representative was exclusive and hence imposed the negative duty to treat with no other. We also pointed out that, as conceded by the Government, the injunction against the Company's entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was 'designed only to prevent collective bargaining with anyone purporting to represent employees' other than the representative they had selected. It was taken 'to prohibit the negotiation of labor contracts generally applicable to employees' in the described unit with any other representative than the one so chosen, **'but not as precluding such individual contracts' as the Company might 'elect to make directly with individual employees.' We think this construction also applies to § 9 (a) of the National Labor Relations Act.**
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> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. **It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.'** "

In its opinion in the present case the Circuit Court of Appeals refused to follow the decision of this Court in the case of **National Labor Relations Board v. Jones & Laughlin**, supra, referring to its opinion in the case of **National Labor Relations Board v. J. I. Case Co., 134 Fed. (2d) 70,** wherein the Circuit Court of Appeals said, in substance, that the language of this Court last above quoted had been rejected in subsequent decisions of this Court, or that this Court did not mean exactly what it said in the Jones & Laughlin case. We respectfully submit that this Court has not in any reported opinion repudiated its holding in the cases of **Virginian Railway Co. v. Federation,** supra, and **National Labor Relations Board v. Jones & Laughlin,** supra, and that the decision of the Court of Appeals is directly contrary to and in conflict with the decisions of this Court in said two cases.

In this connection, note that in the case of National Labor Relations Board v. J. I. Case Co., supra, a collective bargaining agency had been selected and the company refused to deal with such agency, whereas, in the present case no bargaining agency had been certified at the time of the hearing and there was no such refusal to bargain.

While the Court of Appeals does not find that the individual contracts contain any provisions repugnant to the Act, or were obtained by means prohibited by the Act, it attempts to invalidate them by upholding a finding by the Board that "the effect of the contracts has been to forestall union activity among the company's employees and to create a permanent barrier to union organization among them."

The Court fails to point out any evidence in support of this finding, and there is no evidence in the record upon which such a finding can be based. In the first place, there is nothing in either the contracts themselves or in the manner of obtaining the same which prevents or restricts

union activity or creates any kind of a barrier to union organization. In the second place, the actual facts, as established by the Board's own records and findings, show the exact reverse of this finding to be true and affirmatively establish the fact that the contracts have not operated as a permanent or even temporary barrier to union organization. In 1937 more than 85 per cent of the Company's hourly-paid production and maintenance employees organized and joined an independent labor union of their own (Supp. pp. 250-252, 260, 267-270, 516-517). In an organizing campaign in the Company's Smokeless Powder Division, carried on during the first half of the year 1941, more than 500 of the Company's approximately 600 employees in that Division joined an American Federation of Labor union (Supp. p. 68). During the summer of 1941 several hundred additional members joined the American Federation of Labor and procured the charter of another local union. And under date of February 6th, 1943, the National Labor Relations Board certified the American Federation of Labor and Its Affiliated Organizations as the collective bargaining agency for all of the Company's maintenance and production employees. **11 Labor Relations Reporter 807.** During all of this time the individual contracts have been in force and have not interfered one iota in any union organizing activities on the part of the Company's employees. This finding of the Board is not only unsupported by any substantial evidence, but its falsity is established by the Board's own records in this very proceeding as well as in other proceedings.

There being nothing in the individual contracts repugnant to the Act, in that the employees are not required to waive, limit or restrict any of their rights guaranteed by the Act, the Circuit Court of Appeals suggests that they interfere with employees' rights by means of "allurements," presumably the bonus and savings provisions, saying:

> "We agree with counsel for the Board that interference is no less interference because it is accomplished through allurements rather than coercion, when, as here, the system is employed to stem a tide of organization and is adopted as a means of eliminating outside unions as collective bargaining agents of the company's employees."

But note that the bonus and savings provisions of the contract are not conditioned upon the waiver by the employee of any right guaranteed by the Act; they are conditioned merely upon the employee doing his work and remaining in the employ of the Company for the specified period. The Court cites in support of this ruling the decision of this Court in the case of **National Licorice Co. v. National Labor Relations Board, 309 U. S. 350,** which, we submit, makes no such holding. The effect of the Court's ruling in this connection is to say that it is illegal for an employer to allure his employees into not joining a union by giving them bonuses, savings plans, or other benefits which make the conditions of employment so attractive that the employees find it unnecessary to organize in order to assert and protect their rights. And this in a case where the alleged "allurements" are not in any way, expressly or by implication, conditioned upon the employees' not engaging in union organization. If such "allurements," not conditioned in terms or in fact upon abstention from union activity, are illegal as constituting a barrier to union organization, then any benefit or advantage which an employer might give to an employee might be likewise illegal, on the theory that a satisfied employee might not engage in union activity. While the Court said that "the system (of individual contracts) is employed to stem a tide of organization and is adopted as a means of eliminating outside unions as collective bargaining agents of the company's employees," the Court failed to indicate any evidence in the record to support such a finding, except that they were

revived "in 1933 when business was at a very low ebb and when there was much industrial unrest resulting in part from unionization." We respectfully submit that this is not substantial evidence sufficient to support any such finding, and, furthermore, that the Company's motive is immaterial if the contracts are themselves legal and have not been obtained by means of any unfair labor practice.

Superior Oil Co. v. Mississippi, 280 U. S. 390, 395;
Adler v. Fenton, 24 Howard 407, 410;
Gregory v. Helvering, 293 U. S. 465;
Isbrandtsen-Moller Co. v. United States, 300 U. S. 139.

As was said by Mr. Justice Holmes in the case of **Superior Oil Co. v. Mississippi**, supra, l. c. 395:

> "The fact that it desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentioally may go as close to it as you can if you do not pass it."

And in the case of **Adler v. Fenton**, supra, the Court said (l. c. 410):

> "An act legal in itself, and violating no right, cannot be made actionable on account of the motive which superinduced it. It is the province of ethics to consider of actions in their relations to motives, but jurisprudence deals with actions in their relation to law, and for the most part independently of the motive."

B.

In the case of **Consolidated Edison Co. v. National Labor Relations Board**, supra, the Supreme Court pointed out that the National Labor Relations Act gives no express authority to the Board to invalidate contracts; that such authority, if it exists, must rest upon the provisions of Section 10 (c), which authorizes the Board to require the

employer "to take such affirmative action, including reinstatement of employees, with or without back pay, as will effectuate the policies of this Act." The Court said (l. c. 235):

> "We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order."

The Court then held that there was no basis for a finding that the contracts involved in the case (being contracts with a labor organization) had been obtained as a result of any unfair labor practices, or that they contained any provisions repugnant to the Act, and concluded that the Board was without authority to require the employer to desist from giving effect to such contracts.

In the case of **National Licorice Co. v. National Labor Relations Board**, supra, the Court held (l. c. 361):

> "Since the contracts were the fruits of unfair labor practices, stipulated for the renunciation by the employees of rights guaranteed by the Act, and were a continuing means of thwarting the policy of the Act, they were appropriate subjects for the affirmative remedial action of the Board authorized by §10 of the Act."

The Court, however, carefully distinguished its holding from its prior decision in the Consolidated Edison Company case.

The Court of Appeals in the present case has gone beyond the decisions of this Court in both the Consolidated Edison Company and National Licorice Company cases by not only enjoining the Company from giving effect to individual contracts of employment which do

not violate the Act, and which were not the fruits of any violation of the Act, but also by enjoining the Company in perpetuity from requesting its employees to enter into similar contracts of employment. No decision of the Supreme Court has ever gone so far as to deprive an employer of the benefits of a legal contract, legally obtained, nor has this Court ever expressly or by implication approved the issuance of an injunction perpetually enjoining an employer from requesting his employees, in a lawful and proper manner, to enter into lawful and proper contracts. This is a question of substance relating to the construction or application of the National Labor Relations Act and of the Fifth Amendment to the Constitution of the United States, which has not been, but should be, settled by the Supreme Court of the United States.

C.

At the hearing before the Trial Examiner there was offered the testimony of individual members of the Independent with respect to the reasons why and the circumstances under which they joined such union, the fact that they were not solicited or urged to do so by any representative of the Company, and the fact that after becoming members no representative of the Company had ever attempted in any way to direct, control or affect their actions as such members. Objections to the reception of such testimony, and to an appropriate offer of proof, were sustained. This testimony was offered on the theory that it tended to disprove the domination and support of the Independent by the Company. It was competent, relevant and material.

The decision of the Court of Appeals for the Seventh Circuit upholding this ruling is directly contrary to a decision of the Circuit Court of Appeals for the Eighth Circuit in the case of **Donnelly Garment Co. v. National Labor Relations Board, 123 Fed. (2d) 215, 222-223,** where,

on analogous facts, a contrary ruling was made. In the last mentioned case the testimony of individual employees, members of an independent union, was offered for the purpose of showing how and why they formed the union, and that no influence was brought to bear upon them by the employer, either in the formation or administration of the union. The Trial Examiner refused to receive the testimony. The Circuit Court of Appeals for the Eighth Circuit held that this was error, saying (l. c. 222-225):

> "This was not a case where domination and support by an employer of an independent union was conceded or where the independent union was conclusively shown to be of a character which could not, in any event, act as the bargaining representative of its members. The evidence of the Board which tended to show domination and support of the independent union by the Company was circumstantial.
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> "It was not shown that any of the employees of the Donnelly Company whose testimony was offered was under any disqualifying disability. There was no presumption that these employees would commit perjury, and, even if the Trial Examiner believed that they would perjure themselves, that would not have affected the admissibility of their evidence. It is elementary that there is a distinction between the admissibility of evidence and its weight or sufficiency. National Labor Relations Board v. Bell Oil & Gas Co., 5 Cir., 98 F. (2d) 870, 871. Surely, if the testimony of an employee which tends to prove that an employer interfered with or supported the organization of an independent union is admissible, the testimony of an employee which tends to disprove domination and support of such a union by an employer is equally admissible. Evidence is relevant if it tends either to prove or to disprove any issue in a case. We do not say that the Trial Examiner was required to take the same testimony from 1200 witnesses. There were available to him well-known expedients for limiting the number of witnesses where their testimony was cumulative.

"We have no doubt that the testimony offered by the petitioners in their efforts to prove that the employees of the Donnelly Company formed the Donnelly Garment Workers' Union of their own free will and that the formation and administration of that union was free from employer influence, domination and support, and to explain how and why they came to organize the union, was competent, relevant and material and should have been received. The individuals who formed an unincorporated association certainly should know what sort of an organization it is, how it happened to be formed, who influenced its formation, and who controls it. We think there can be no doubt of the right of the members of such an organization to testify to such matters, and that their evidence is admissible regardless of its weight.

"That evidence of employees such as was offered in this case has ordinarily been regarded as admissible on the issue of employer domination and support and has been received and considered, is indicated in many cases. In Humble Oil & Refining Co. v. National Labor Relations Board, 5 Cir., 113 F. (2d) 85, 91, it was said of such testimony: 'If human testimony can establish anything, it establishes that Humble did not dominate or interfere with the organization of either Federation.' See, also, National Labor Relations Board v. Brown Paper Mills Co., Inc., 5 Cir., 108 F. (2d) 867, 871; National Labor Relations Board v. Skinner & Kennedy Stationery Co., 8 Cir., 113 F. (2d) 667, 670; Foote Bros. Gear & Mach. Corp. v. National Labor Relations Board, 7 Cir., 114 F. (2d) 611, 622, 623; National Labor Relations Board v. Automotive Maintenance Machinery Co., 7 Cir., 116 F. (2d) 350, 355, 356; American Enka Corporation v. National Labor Relations Board, 4 Cir., 119 F. (2d) 60, 63; National Labor Relations Board v. Sparks-Withington Co., 6 Cir., 119 F. (2d) 78, 82; National Labor Relations Board v. Moore-Lowry Flour Mills Co., 10 Cir., 122 F. (2d) 319, 429. Compare Bethlehem Steel Co. v. National Labor Relations Board, App. D. C., 120 F. (2d) 641, 653, but see the dissenting opinion in that case by Judge Stephens on pages 662 and 663. * * *

"That a refusal by an administrative agency such as the National Labor Relations Board to receive and consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not open to debate. See St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 73, 56 S. Ct. 720, 80 L. Ed. 1033; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 304-305, 57 S. Ct. 724, 81 L. Ed. 1093; Railroad Commission v. Pacific Gas & Electric Co., 302 U. S. 388, 393, 58 S. Ct. 334, 82 L. Ed. 319; Morgan v. United States, 304 U. S. 1, 14, 15, 58 S. Ct. 773, 999, 82 L. Ed. 1129. As Mr. Justice Stone said in his dissenting opinion in Pittsburgh Plate Glass Co. v. National Labor Relations Board, 313 U. S. 146, 177, 61 S. Ct. 908, 923, 85 L. Ed. 1251, 'One of the most important safeguards of the rights of litigants and the minimal constitutional requirement, in proceedings before an administrative agency vested with discretion is that it cannot rightly exclude from consideration, facts and circumstances relevant to its inquiry which upon due consideration may be of persuasive weight in the exercise of its discretion. Interstate Commerce Commission v. Chicago, R. I. & P. Ry. Co., 218 U. S. 88, 102, 30 S. Ct. 651, 656, 54 L. Ed. 946; St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 75, 78, 56 S. Ct. 720, 736, 737, 80 L. Ed. 1033; Ohio Bell Telephone Co. v. (Public Util.) Commission, 301 U. S. 292, 304, 305, 57 S. Ct. 724, 730, 81 L. Ed. 1093'; and there can be no compromise of this requirement on 'the footing of convenience or expediency, or because of the natural desire to be rid of harassing delay.' Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 305, 57 S. Ct. 724, 731, 81 L. Ed. 1093. That the Board would or might have reached no different conclusion had the rejected evidence been received, is entirely beside the point. The truth is that a controversy tried before a court or before an administrative agency is not ripe for decision until all competent and material evidence proffered by the parties has been received and considered. See National Labor Relations Board v.

Thompson Products, Inc., 6 Cir., 97 F. (2d) 13, 15; Foote Bros. Gear & Mach. Corp. v. National Labor Relations Board, 7 Cir., 114 F. (2d) 611, 621.

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"Our conclusion is that the petition of the Board for enforcement of the order under review must be denied. We think that the least that the Board can do, in order to cure the defects in its procedure caused by the failure of the Trial Examiner to receive admissible evidence, is to vacate the order and the findings and conclusions upon which it is based; to accord to the petitioners an opportunity to introduce all of the competent and material evidence which was rejected by the Trial Examiner; and to receive and consider such evidence together with all other competent and material evidence in the record before making new findings and a new order.

"Because of lack of due process in the proceedings before the Board, the question of the sufficiency of the evidence to support the findings and order will not be considered.

"The petition of the Board for the enforcement of its order is denied, and the case is remanded to the Board for further proceedings."

The conflict between the above decision of the Eighth Circuit and the decision of the Seventh Circuit in the present case is apparent.

The decision of the Circuit Court of Appeals is also in conflict with the decision of the Supreme Court of the United States in the case of **National Labor Relations Board v. Indiana & Michigan Electric Co., 318 U. S. 9, 28,** where the Court said (l. c. 28):

"The Act accords a great degree of finality to the Board's findings of fact, and this Court has been insistent that the admonition of the Act be strictly observed. But courts which are required upon a limited review to lend their enforcement powers to the

Board's orders are granted some discretion to see that the hearings out of which the conclusive findings emanate do not shut off a party's right to produce evidence or conduct cross-examination material to the issue. The statute demands respect for the judgment of the Board as to what the evidence proves. But the court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed."

D.

Although the Board found that the Company instigated the formation of and dominated and interfered with the administration of the Independent, we respectfully submit that there is no substantial evidence in the record to support such finding. We will not, at this time, burden the Court with a recital and discussion of the evidence which the Board was compelled to rely upon to sustain such finding. However, if the writ of certiorari be granted, petitioner will undertake upon brief and argument to demonstrate to the Court that there is an utter lack of substantial evidence to support this finding.

E.

Likewise, with respect to the Board's finding that the Company discriminatorily discharged William Elliott, it is the position of the petitioner that such finding is not supported by substantial evidence in the record, as petitioner will endeavor to show upon brief and argument, if the writ is granted.

Petitioner, therefore, respectfully submits that the Court, in the exercise of its supervisory power, should grant to the petitioner a writ of certiorari, and thereafter review and reverse the judgment and decree of the Circuit Court of Appeals.

Respectfully submitted,

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